Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS LLC	)	
	)	
Petition for Forbearance Under	)	WC Docket No. 03-266
47 U.S.C. §160(c) from Enforcement	)	
of 47 U.S.C. § 251(g), Rule 51.701(b)(1),	)	
and Rule 69.5(b)	)	

OPPOSITION OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

SBC Communications, Inc., and its wholly owned affiliates (collectively, SBC) submit the following comments in opposition to the above-captioned petition for forbearance filed by Level 3 Communications, LLC (Level 3).[1] Level 3 asks the Commission to create a broad new exemption from access charges for certain voice over Internet Protocol (VoIP) services, which would give Level 3 the ability to use incumbent local exchange carrier (ILEC) access facilities at rates far below those available to Level 3's non-IP based competitors. But this is precisely the type of "regulatory arbitrage" that the Commission has been laboring for so long to purge from its access charge regime.[2] In addition to providing Level 3 with an unfair competitive advantage,

[1] Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (Dec. 23, 2003) (Level 3 Petition).

[2] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 ¶ 12 (2001) (*Intercarrier NRPM*) (describing various forms of regulatory arbitrage).

eliminating access charges in the fashion described by Level 3 would pose a significant threat to the affordable and universally available telecommunications services that American consumers and businesses have come to depend on. It is because of concerns like these that the Commission has wisely and consistently chosen to address issues that affect access charges and universal service in a holistic fashion. Accordingly, the Commission should deny Level 3's petition and reject its invitation to depart from that well-established practice.

As an initial matter, Level 3 erroneously claims that voice-based IP-PSTN traffic falls outside the Commission's *existing* access charge regime today and suggests that its petition may not even be necessary to exempt this traffic from access charges.[3] Level 3 is simply wrong. From its inception more than twenty years ago, the access charge regime has always applied to all users of ILEC access services, including enhanced service providers (ESPs),[4] unless a specific exemption applies. And contrary to Level 3's overbroad assertions, the so-called "ESP exemption" is limited in scope -- it only exempts an ESP from paying access charges when that ESP uses an ILEC's facilities to communicate with the ESP's *own customers*. The ESP exemption does not, and was never intended to, exempt an ESP from paying terminating access charges when it picks up a call from its own customer and subsequently terminates that call, not to its own databases or other information sources, but to the *plain old telephone service (POTS) customer of an ILEC on the PSTN*. Nor was the ESP exemption ever intended to exempt an ESP

[3] In these comments, SBC uses the term IP-PSTN to collectively describe traffic that originates in IP and terminates on the PSTN as well as traffic that originates on the PSTN and terminates in IP, unless otherwise noted. *See* Level 3 Petition at 1 (referring to IP-PSTN traffic and PSTN-IP traffic collectively as IP-PSTN traffic).

[4] The Commission has observed that "information service" is a broader term than "enhanced service" and has stated that "while all enhanced services are information services, not all information services are enhanced services." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking 13 FCC Rcd 11230 ¶ 103 (1996) (*Non-Accounting Safeguards Order*). For convenience, SBC generally uses the terms "ISP" and "ESP" interchangeably (though consistent with the Commission's understanding of these terms) throughout these comments.

from paying originating access charges when an *ILEC's POTS customer* originates a call from the PSTN that is delivered to an ESP who then terminates the call to its own customer.

Because the Commission's existing access charge regime *does* apply to IP-PSTN traffic to the extent it originates or terminates on the PSTN, Level 3 must *necessarily* seek forbearance to be excused from its lawful access charge obligations under the Commission's rules. But Level 3 has failed to meet each of the three statutory criteria for forbearance. First, the forbearance requested by Level 3 would result in unreasonable price discrimination between similarly situated users of ILEC access services and would lead to unjust and unreasonable rates for those access services. Second, forbearance would harm consumers by jeopardizing the universal availability of affordable telecommunications service across the nation. And third, forbearance would contravene the public interest by creating a massive opportunity for regulatory arbitrage that will undermine fair and efficient competition in the communications marketplace. Thus, as matter of law, the Commission is required to deny Level 3's petition.

Notwithstanding SBC's opposition to Level 3's forbearance petition, SBC believes that end users who purchase IP-based services -- which we refer to as "IP platform services" -- are obtaining interstate information services that are not subject to traditional common carrier regulation.[5] To the extent these services originate or terminate over the PSTN, however, they are subject to the access charge regime until such time as the Commission moves to bill-and-keep or otherwise modifies its access charge rules. To that end, SBC remains committed to working with the Commission, the communications industry, and other stakeholders to develop and implement a fair and equitable proposal for intercarrier compensation reform.

[5] *See* Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-__ (Feb. 5, 2004) (SBC IP Platform Services Petition for Declaratory Ruling); Petition of SBC Communications Inc. for Forbearance from Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No 04-29 (Feb. 5, 2004) (SBC IP Platform Services Petition for Forbearance).

II. BACKGROUND

To properly evaluate Level 3's petition, the Commission must consider it in the larger context of the Commission's overall efforts to reform access charges and universal service under the 1996 Act. Since the passage of the 1996 Act, the Commission and the telecommunications industry have expended substantial time and resources to conduct these reform efforts in a fair, coordinated and comprehensive manner. By proceeding in this measured, holistic fashion, the Commission and the industry have made significant strides in removing implicit support from interstate access charges, creating explicit universal service support mechanisms to replace implicit interstate subsidies, and introducing competition to the marketplace -- all while boosting telephone subscription rates to the highest levels in our nation's history.[6]

This delicate balancing act has succeeded so far because the Commission has recognized that effective reform requires simultaneous attention to three key variables that affect the affordability of telecommunications service: (1) access charges; (2) universal service; and (3) end-user rates. As discussed below, the Commission has wisely chosen not to focus on a single variable in isolation without contemporaneously addressing the impacts on the others.

Congressional Principles for Reform. In the 1996 Act, Congress sought to provide a "pro-competitive, deregulatory national policy framework" that would "open all telecommunications markets to competition."[7] But Congress recognized that introducing competition into the telecommunications marketplace would require access charge and universal service reform. To assist the Commission, Congress provided guidance for how these reforms should be conducted. Among other things, Congress specified that universal service support should be "explicit."[8] Congress also preserved the pre-existing access charge regime, and the

[6] Telephone Subscribership in the United States, Industry Analysis and Technology Division, FCC (Jan. 2004) (as of July 2003, over 95% of all households in the U.S. had telephone service).

[7] Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.)

[8] 47 U.S.C. § 254(e).

ILECs' rights to receive access charges, unless and until that regime is superseded through the Commission's reform efforts.[9]

1997 Access Charge & Universal Service Reform Orders. In response to the 1996 Act, the Commission adopted companion orders, on the very same day, addressing access charge and universal service reform. In the *Universal Service Order*, the Commission adopted the framework for an explicit universal service support mechanism to ensure affordable rates in all areas of the country.[10] At the same time, in the *Access Charge Reform Order*, the Commission began removing implicit support from interstate switched access charges while gradually increasing certain end-user rates.[11]

CALLS Order. In 1999, a coalition of large and mid-sized ILECs together with two of the three largest IXCs presented the Commission with a comprehensive proposal for access charge and universal service reform for price cap ILECs. In adopting the proposal, with certain modifications, the Commission further advanced its reform efforts by removing additional implicit support from interstate switched access charges, creating a new interstate access universal service support mechanism, and gradually raising end-user rates.[12]

MAG Order. Similar to the CALLS proposal, in 2000, a coalition of rate-of-return carriers presented the Commission with a comprehensive plan for access charge and universal service reform. Based on the proposal, the Commission adopted reforms for these (mostly rural) carriers that removed implicit support from interstate switched access charges, created a new

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[9] 47 U.S.C. § 251(g).

[10] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*).

[11] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Order*).

[12] *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

interstate access universal service support mechanism, and incrementally increased end-user rates.[13]

Intercarrier Compensation NPRM. In its most far reaching effort to reform access charges and universal service so far, the Commission in 2001 sought comment on moving away from intercarrier compensation altogether and instead instituting a bill-and-keep regime with the goal of "encourag[ing] efficient use of, and investment in, telecommunications networks, and the efficient development of competition."[14] The Commission recognized, however, that any such reform would also affect universal service and end-user rates, and therefore sought comment on how these issues should be addressed in a bill-and-keep environment. In response to the rulemaking, the telecommunications industry has devoted tremendous amounts of time and resources to developing a proposal that would enable the Commission to move to a fair and rationale bill-and-keep regime. SBC fully supports intercarrier compensation reform and we remain hopeful that the industry will be able to present the Commission with such a proposal in the near future.

As the progress of the last 8 years demonstrates, to be successful, access charge and universal service reform must be undertaken in a way that comprehensively addresses the competing needs of various stakeholders.[15] The Commission cannot achieve effective reform on a piecemeal basis where only a single carrier (or class of carriers) stands to benefit without regard to the costs imposed on other carriers or their customers. Yet, this is precisely what Level

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[13] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*MAG Order*).

[14] *Intercarrier NRPM* ¶ 2.

[15] By contrast, where the Commission is called upon to clarify or interpret its existing rules (rather than eliminate or modify those rules), the Commission should move as expeditiously as possible to provide the requested guidance, particularly when necessary to shut down regulatory arbitrage that is squarely at odds with the need for a holistic approach to access charge and universal service reform. *See Ex Parte* Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-361 (Jan. 14, 2004) (urging the Commission to rule expeditiously on AT&T's access avoidance petition).

3 is asking the Commission to do with its present petition for forbearance. By its very nature, Level 3's forbearance petition would only allow the Commission to delete certain portions of the rules relating to access charges; it does not permit the Commission to modify those rules or the separate rules relating to universal service and end-user rates.

More importantly, for the reasons discussed below, Level 3's petition fails the statutory test for forbearance. Thus, even if the Commission wanted to eliminate its access charge rules as they apply to IP-PSTN traffic, Level 3's petition does not provide a lawful basis for doing so. Accordingly, the Commission should deny Level 3's petition and remain faithful to its time-tested, holistic approach to access charge and universal service reform.

III. DISCUSSION

A. Under Current Law, VoIP Calls Are Subject to Access Charges When They Originate or Terminate In Circuit-Switched Format on the PSTN.

Level 3's petition proceeds from the flawed premise that forbearance is not truly required to exempt IP-to-PSTN or PSTN-to-IP voice traffic from the payment of access charges on either the PSTN-originating or PSTN-terminating side of the call, because — to the extent Voice over Internet Protocol (VoIP) is treated as an information service — the Commission's so-called "ESP exemption" should already excuse VoIP providers from paying such charges.[16] But Level 3's overbroad characterization of the ESP exemption is simply inaccurate, and, in fact, belied by its own petition.

As an initial matter, SBC steadfastly believes that the VoIP services described by Level 3 in its petition should be treated as information services when Level 3, or anyone else, provides those services to their IP customers.[17] SBC also agrees that, under current law and Commission policy, traffic carried over an IP network between a VoIP provider and *its own* subscribers would

[16] *See* Level 3 Petition at 9 (not conceding that access charges apply and that forbearance is even necessary); *id.* at 22 (asserting that the Commission has "acknowledged that IP-PSTN communications have been viewed as exempt from access charges, at least when the IP voice provider interconnects with the PSTN using local business services pursuant to the 'ESP exemption'").

[17] *See* Level 3 Petition at 11-14 (describing a variety of VoIP-based services).

be exempt from access charges, to the extent that such traffic is considered an information service. But the ESP exemption does *not*, and was never intended to, exempt the VoIP provider from paying terminating access charges when the call originates in IP, is subsequently converted to circuit-switched format and is delivered to the PSTN to terminate to a LEC's end-user customer as a normal, POTS voice telephone call. By the same token, the ESP exemption was never designed to eliminate originating access charges on a standard POTS, circuit-switched call that originates over the PSTN from a LEC end-user and is subsequently converted to IP by a VoIP provider for termination as an information service to that provider's customer. While, in that scenario, access charges might not be due for the *last* leg of the call between the VoIP provider and *its* subscriber, the first leg of the call, which is just a normal telephone call being placed by a PSTN user who likely is not even *aware* that a VoIP provider will play a role in completing his or her call, is, and always has been, subject to originating access charges.

Accordingly, leaving aside whether forbearance from the obligation to pay such access charges would be *proper* — and as we discuss below, it would not be — it unquestionably would be *necessary* in order to excuse VoIP providers from paying access charges in connection with the leg of the VoIP call that is PSTN-originated by, or PSTN-terminated to, a LEC customer that is not directly using the VoIP provider's service and is instead using POTS voice telecommunications service.

1. Information Service Providers Use Exchange Access Services and Accordingly Are Subject to the Obligation to Pay Access Charges Except to the Extent that an Express Exemption Applies.

The Commission has consistently recognized that ISP are users of exchange access services, and thus are subject to the baseline obligation to pay access charges absent an exemption.[18] As the Commission observed as long ago as 1983, ISPs are "[a]mong the variety of

[18] That baseline obligation, as it applies to IXCs, is now codified in section 69.5 of the Commission's rules. *See* 47 C.F.R. § 69.5(b). Although rule 69.5(b) provides that access charges "shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services," 47 C.F.R. § 69.5(b), neither the rule nor the Commission's orders suggest that section 69.5 is intended to circumscribe the entire universe of access users that are permitted to use access services and are required to pay access charges for those services. Indeed, the

users of access services," which also include "facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small."[19] Indeed, as the Commission recognized, ISPs, like IXCs, typically "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit [the ISP's] location" and which the ISP then "connects . . . to another service or facility over which the call is carried out of state."[20] Thus, as the Commission has expressly noted, when it initially created the access charge regime, its "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers *and enhanced service providers* . . . ."[21] And the Commission later reiterated that it "initially intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings."[22]

Commission has made clear that section 69.5 governs the obligations of both IXCs and end users to pay for access. *See, e.g., Biennial Regulatory Review of Regulations Administered by the Wireline Competition Bureau*, WC Docket No. 02-313, Notice of Proposed Rulemaking, FCC 03-337 ¶ 42 (2004); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing No. 03-10, Memorandum Opinion and Order, 18 FCC Rcd 11356 ¶ 2 (2003). Where entities other than IXCs use the precise same access services that IXCs do, they accordingly purchase access services out of the local exchange carrier's 69.5(b) tariffs, and are obligated to pay the associated charges. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶ 873 (1996) (*Local Competition Order*) ("LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services."). Indeed, LECs *must* permit even non-carrier and non-ISP end-user customers to purchase access services out of the rule 69.5(b) tariffs, since any other rule would constitute an impermissible use restriction. *See Filing and Review of Open Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rcd 1 ¶¶ 321-24 (1998) (*BOC ONA Order*). Further, as noted below, the ESP exemption the Commission crafted would not have been necessary in the first instance if access charges were not presumptively applicable to ISPs.

[19] *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 ¶ 78 (1983) (*MTS/WATS Market Structure Order*).

[20] *MTS/WATS Market Structure Order* ¶ 78.

[21] *MTS/WATS Market Structure Order* ¶ 76 (emphasis added).

[22] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 ¶ 2 (1987).

Indeed, it is precisely *because* the requirement to pay access charges *should*, in the normal course, be applicable to ISPs' use of exchange access services that the Commission ultimately crafted what is commonly referred to as the "ESP *exemption*" to excuse ISPs from certain access charges. Specifically, in 1983, the Commission created a limited exemption from the carrier access charge obligation for what was then the fledgling ISP business. As part of this "ESP exemption," the Commission permitted ISPs to obtain access services needed to receive traffic from their end-user customers by ordering "end user" lines from local exchange carriers' local business tariffs, and required them to pay an additional surcharge designed to substitute, to some extent, for direct payment of access charges.[23] But as the Commission explained, despite this special arrangement, ISPs are not true "end users;" rather, they are merely treated as end users "for pricing purposes."[24]

The Commission has never wavered from this view, even as the ISP industry has expanded and developed over the past two decades.[25] Nor has the Commission ever suggested that the reach or scope of the access charge obligation has changed in any way since it was first adopted. To the contrary, in the 1996 Act, Congress itself clarified that access services in general, including "exchange access, information access, and exchange services for such access" would be provided "to interexchange carriers and information service providers" in the same manner as it had been *prior* to the 1996 Act, "including receipt of compensation" for such access.[26] While the Commission has begun to explore phasing-out access charges in its

[23] *See MTS/WATS Market Structure Order* ¶¶ 77-83; *BOC ONA Order* ¶ 318.

[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 ¶ 17 (1999) (*ISP Intercarrier Compensation Order*).

[25] *See, e.g., ISP Intercarrier Compensation Order* ¶ 16 (noting its "understanding that ESPs in fact use interstate access service"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, et al, Order on Remand, 15 FCC Rcd 385 ¶ 43 (1999) (referring to "the Commission's longstanding characterization of the service that LECs offer to enhanced services providers (which include ISPs) as exchange access").

[26] 47 U.S.C. § 251(g).

Intercarrier Compensation NPRM, it has not yet eliminated or changed the scope of the access charge obligation, and it thus continues to apply. Of course, over time, the access charge rates have been greatly reduced, for example, by the *CALLS Order* and the *MAG Order*. But the obligation to pay access charges remains applicable except where *existing* law and rules create an exemption.

2. The ESP Exemption Is Limited in Scope — It Only Excuses ISPs from Paying Access Charges that Otherwise Would Apply When an ISP Uses the Local Exchange Network to Allow Its Subscribers to Access an Information Service.

Level 3 appears to construe the ESP exemption broadly to insulate ISPs from *any* requirement to pay *any* access charges on VoIP calls by citing an isolated Commission statement in the *Intercarrier Compensation NPRM* that "'long distance calls handled by ISPs using IP telephony'" are "'generally exempt from access charges under the enhanced service provider (ESP) exemption.'"[27] But Level 3 construes the ESP exemption overbroadly and incorrectly. The ESP exemption was never intended to be a complete exemption from *all* access charges on any call passing through an ISP's location to or from the PSTN.[28] To the contrary, the ESP exemption was a limited carve-out from the access charge rules specifically designed to kick start the ISP industry by allowing ISPs to connect to their subscribers at reduced rates.[29] Thus,

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[27] Level 3 Petition at 26 (quoting *Intercarrier Compensation NPRM* ¶ 6).

[28] As the Commission has stated, the ESP exemption enables ISPs to avoid "the payment of *certain* interstate access charges" — not all such charges. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 11 (2001) (*ISP Remand Order*) (emphasis added), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003).

[29] Obligating VoIP providers to pay terminating access will not implicate the policy concerns that motivated the creation of the ESP exemption in the first place: in 1983, the Commission was concerned about protecting the fledgling ESP industry from "rate shock" as a result of the very high access charges that were typical at that time. But the entities providing VoIP today are typically not "fledgling" providers; they include the major cable giants, for example, and other well-established providers. Moreover, interstate access charges today are a tiny fraction of what they were when the ESP exemption was created.

the ESP exemption applies where the LEC's exchange access services are being used to provide the link *between* the ISP and its subscribers, for the provision of an information service by the ISP to its subscriber. Only this particular use of the PSTN by an ISP is exempt from access charges — in all other cases, access charges apply to an ISP's use of an ILEC's access facilities.

This is clear from the history of the ESP exemption, its focus, and the manner in which it has been described. Most importantly, in the *MTS/WATS Market Structure Order*, in which the Commission first adopted the ESP exemption, the Commission focused exclusively on the ISP's use of the local exchange network to have calls delivered to the ISP's "location in the exchange area" from the ISP's subscribers.[30] There was no discussion whatsoever of any connection between the ISP and end users who were not its customers. Similarly, in the *Access Charge Reform Order*, the Commission recognized the targeted nature of the ESP exemption, noting that the exemption carves ISPs out from the access charge obligation when they "use incumbent LEC networks *to receive calls from their customers*."[31]

In perhaps its most candid description of the ESP exemption, the Commission described the exemption in the context of IP telephony as a form of "regulatory arbitrage" because "of the different rates that different types of service providers must pay for essentially the same types of calls. For example, the fact that an IXC must pay access charges to the LEC that *originates* a long-distance call, while an ISP that provides IP telephony does not, gives the provider of IP telephony an artificial cost advantage over providers of traditional long distance service."[32]

In describing and defending the ESP exemption over the years, ISPs and carriers alike similarly have focused on ISPs' use of exchange access to allow their subscribers to *access their information service.* As WorldCom explained to the Commission, for example, "Currently, many ESPs subscribe to thousands of local telephone lines *to allow their subscribers to access*

[30] *MTS/WATS Market Structure Order* ¶ 78.

[31] *Access Charge Order* ¶ 343 (emphasis added).

[32] *Intercarrier Compensation NPRM* ¶ 12 (emphasis added).

their information services with a local telephone call."[33] Likewise, in defending the continued application of the ESP exemption, Compuserve and Prodigy described the access provided by ILECs to ISPs via retail business lines as the means on "which the independent ISPs are dependent *to reach their customers*."[34] And in the same proceeding, the Internet Access Coalition stated "that ISPs use business lines solely to receive incoming calls" from their information service subscribers.[35]

Indeed, the information services that predominated until the recent advent of VoIP would rarely if ever have given the Commission cause to consider an expansion of the ESP exemption to any other use by the ISP of exchange access to the PSTN, because ISPs typically used the PSTN exclusively to *receive* calls from subscribers seeking to access their information service. As the Commission observed in the context of reconsidering its access charge rules, many enhanced services "are provided pursuant to a network configuration in which a call originates over an 'open' end and terminates over a 'closed' end."[36]

More specifically, ISP calls typically were only "open" to the PSTN on their subscribers' side of the call: traditionally, subscribers accessed their ISP over the PSTN using the LEC's exchange access service, and then the ISP "terminated" the call to a database or computer using an interstate connection that in many cases was provided over an IXC's interstate facilities — avoiding the PSTN altogether on the terminating end of the call. And in any event, the call certainly did not continue on or return to a different point on the PSTN again *after* hitting the ISP's distant computer or database site. Rather, the only exchange access that was used was the link between the information service customers and the ISP's point of presence (POP) in a

[33] Comments of WorldCom, *Usage of the Public Switched Network by Information Service and Internet Service Providers*, CC Docket No. 96-263, at 14 (Mar. 24, 1997) (emphasis added).

[34] *Access Charge Order*, Appendix B ¶ 207 (emphasis added).

[35] *Id.* ¶ 206.

[36] Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305 ¶ 9 n.27 (1987).

particular exchange that provided those customers access to the ISP's database.[37] In sum, typical information services would not have given the Commission occasion to even consider expanding the ESP exemption to insulate traffic from *all* access charges where the PSTN is used on both ends of the call by the ISP for purposes other than allowing the subscriber to obtain access to the ISP's information service.

The ESP exemption thus does not, today, exempt all access charges in the two scenarios Level 3 describes: (1) when a non-ISP subscriber picks up his or her standard telephone and dials a regular phone number to reach the called party (who happens to be a Level 3 subscriber), and, at some point along the way, that call is handed off by the calling party's carrier to Level 3 and terminated by Level 3 as an IP-based call; and (2) when the Level 3 subscriber initiates an IP-based call and Level 3 (or another CLEC) hands off that call at some point into the PSTN, to be delivered as a POTS call over the circuit-switched network to a LEC end user that the Level 3 subscriber chooses to call.[40] In both scenarios, on at least one side of the call, the ISP would be

[37] A concrete example of this network configuration is the "Talking Yellow Pages" service discussed by the Commission in *Northwestern Bell Telephone Company*, which allowed information service customers to dial a local number to hear recorded advertisements. *See Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986 (1987) (*Teleconnect Order*). Such calls were transported over interexchange facilities obtained from the local exchange carrier, which the ESP connected to its POP in a distant exchange where the recorded information was centrally stored. *See id.* ¶ 2. Although the Commission later vacated its decision regarding this service as moot after discovering that the ESP (Teleconnect) was not using this particular arrangement to provide the service, *see Northwestern Bell Telephone Company Petition for Declaratory Ruling and WATS Related and Other Amendments of Part 69 of the Commission's Rules*, Memorandum Opinion and Order, 7 FCC Rcd 5644 ¶ 1 (1992), this description nonetheless illustrates the types of information services that existed — and the network configuration the Commission had in mind — when it created and developed the ESP exemption. Moreover, the Commission's analytical approach in evaluating the Talking Yellow Pages service demonstrates that the ESP exemption is not as broad as Level 3 would suggest. The Commission stated that, to determine whether Teleconnect must pay access charges, it must address two questions: "first, whether Talking Yellow Pages is an enhanced service; and second, if it is, *whether the access charge exemption applies to the particular configuration Teleconnect uses to offer the service*." *Teleconnect Order* ¶ 20. Thus, merely offering an enhanced service is not enough by itself to invoke the ESP exemption. An ESP must also use the LEC's network in a specific, limited fashion to be exempt from access charges.

[40] *See, e.g.*, Level 3 Petition at 4, 6, 17.

using the PSTN *not* so that *its* subscriber may access its *information service*, but so that a *non*-subscriber can place or receive an ordinary POTS call.

Indeed, under these two scenarios, it is not even proper to view the connection over the PSTN as a direct part of the "information service." When a LEC end-user makes a standard telephone call in the first scenario, that end-user is not receiving an information service. While Level 3 may pick up the call and provide an IP-based information service to *its* subscriber when it terminates the call, the *originating* caller is obtaining nothing other than a standard long distance voice call. From the LEC end-user's perspective, the call bears every characteristic of a standard voice telephone call described by the Commission in the *Report to Congress*: the end-user is using standard CPE, is using a standard telephone number from the North American Numbering Plan, and is transmitting a standard voice call with no obvious changes in form or content.[41] Indeed, as Level 3 itself concedes, the telephone number dialed remains a critical piece of information for the first leg of the call, *until* it hits the Level 3 POP: only at that point is the phone number translated to an IP address and the call converted to IP so that it may be terminated by Level 3 to *its* subscriber as an information service.[42]

Ironically, Level 3 itself seems to recognize that in this scenario, access charges *do apply under existing law*: as it notes in footnote 34 on page 17 of its petition, to the extent that the LEC end-user's call was carried by the end-user's IXC to the Level 3 POP, that IXC *would* be required to pay originating access to the end-user's LEC.[43] Level 3 is undoubtedly correct on that point. The ESP exemption cannot be used to shield what is clearly a POTS call from originating access charges. The ESP exemption reflected the Commission's understanding that, based on the typical scenarios presented to it *at the time*, "it is not clear that ISPs use the public

[41] *See Report to Congress* ¶¶ 84-89.

[42] *See* Level 3 Petition at 16-17.

[43] *See* Level 3 Petition at 17 n.34.

switched network in a manner analogous to IXCs."[44] But in this scenario, it is perfectly clear that Level 3's use of the PSTN in the origination of the call would be *identical* to an IXC's.

That is equally true with respect to the terminating end of the call in the second scenario Level 3 describes. While the Level 3 subscriber in the second scenario may be using an IP-based information service when it places the call using Level 3's service, the LEC end-user who *receives* the call is not purchasing an information service. Rather, that end user receives the call in a manner that is indistinguishable from any other POTS call received over the PSTN. The call is delivered over the circuit-switched network to a standard telephone number and received using standard CPE. Again, the service provided to the called party on the LEC's PSTN, the call's terminating leg, is no different from a call delivered by an IXC; it has no characteristics of an information service but instead appears as a standard telecommunications service to the called party. Thus, contrary to Level 3's suggestions, the ESP exemption does not shield it from paying terminating access charges when a VoIP call is delivered to the PSTN.[45]

B. Level 3's Petition Fails All Three Prongs of the Statutory Test for Forbearance.

As previously discussed, the Commission's existing access charge regime applies, and always has applied, to IP-PSTN traffic to the extent it originates or terminates on the PSTN. Thus, to be excused from its lawful access charge obligations under the Commission's rules, Level 3 has no choice but to seek forbearance. Level 3's petition, however, completely fails to meet each of the three statutorily required criteria for forbearance. First, the forbearance

[44] *Access Charge Reform Order* ¶ 343.

[45] In making generalized references to the ESP exemption, the Commission has occasionally described the exemption in generic terms as allowing ISPs to avoid paying access charges. *See, e.g., General Communication, Inc.*, EB-00-MD-016, Memorandum Opinion and Order, 16 FCC Rcd 2834 ¶ 17 (2001) (describing the ESP exemption as a Commission decision to "exempt enhanced service providers ("ESPs"), including ISPs, from purchasing interstate access services from interstate access tariffs."). Some commenters supporting Level 3's petition may take these shorthand descriptions out of context and claim that the ESP exemption allows them to avoid access charges for *any* use of the PSTN. As discussed above, however, the Commission clearly never intended such an expansive reading of the ESP exemption -- an exemption which the Commission regards as a form of regulatory arbitrage. *Intercarrier NPRM* ¶ 12 (describing examples of regulatory arbitrage).

requested by Level 3 would result in unreasonable price discrimination between similarly situated users of ILEC access services and would lead to unjust and unreasonable rates for those access services. Second, forbearance would harm consumers by jeopardizing the universal availability of affordable telecommunications service across the nation. And third, forbearance would contravene the public interest by creating a massive opportunity for regulatory arbitrage that will undermine fair and efficient competition in the communications marketplace. As a matter of law, therefore, the Commission is required to deny Level 3's petition.

1. Statutory Criteria for Forbearance

Under section 10 of the Communications Act,[46] a party seeking forbearance from the Commission's regulations or a provision of the Act must demonstrate the following:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

In evaluating the third prong of the forbearance test (the public interest), section 10 also directs the Commission to consider whether forbearance will promote competitive market conditions, including whether forbearance will enhance competition among providers of telecommunications services.[47]

As the D.C. Circuit has explained, the three prongs of this forbearance test are conjunctive -- they "must all be satisfied" before the Commission may forbear from enforcing a regulation or statutory provision.[48] If a party fails to satisfy any one of the three prongs, the

[46] 47 U.S.C. § 160(a).

[47] 47 U.S.C. § 160(b).

[48] *Cellular Telecommunications and Internet Association v. FCC*, 330 F.3d 502, 509 (2003).

Commission may not grant forbearance.[49] As discussed below, Level 3 falls short of meeting any of statutory prongs for forbearance -- let alone all three -- and the Commission must therefore deny Level 3's petition.

2. Forbearance from Applying Access Charges to IP-PSTN Calls Would Be Unreasonably Discriminatory and Would Lead to Unjust and Unreasonable Rates.

a. Forbearance Would Be Unreasonably Discriminatory.

Level 3 asserts that forbearing from access charges on IP-PSTN calls would not be unreasonably discriminatory because the access charge regime is in a state of transition and "can hardly be considered part of a coherent system of intercarrier compensation with logically defined boundaries."[50] In essence, Level 3 is arguing that because the Commission has not fully reformed its intercarrier compensation system, there is nothing unreasonable about making that system *more* discriminatory by exempting a certain type of traffic (IP-PSTN calls) from access charges while the reform process is still ongoing.

Contrary to Level 3's claims, such discrimination would be entirely unreasonable. If the Commission were to forbear from applying access charges to IP-PSTN calls as described by Level 3, the Commission would unquestionably be sanctioning discrimination by giving preferential treatment to a particular class of service providers that use the PSTN in the exact same way as other access customers who are required to pay access charges under the Commission's long standing rules. Specifically, Level 3 would have the Commission discriminate in favor of a particular type of service (voice communications), provided in particular areas of the country (non-rural ILEC service areas), by a particular class of carriers (Level 3 and similar providers). Carriers meeting this profile would be permitted to pay lower rates for using ILEC access services, thus giving them a substantial cost advantage over other

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[49] *Id.*

[50] Level 3 Petition at 47.

carriers offering competing voice services (e.g., carriers providing traditional long distance service) who use the very same access services to terminate calls on the PSTN.[51] This cost advantage would have the effect of artificially incenting additional providers who fit this profile to enter the market based on the opportunity to profit from regulatory arbitrage.

There is simply no reasonable basis upon which the Commission could justify such discriminatory treatment in favor of Level 3 and similar carriers -- especially while the Commission and the communications industry are attempting a comprehensive overhaul of the intercarrier compensation regime. Indeed, the Commission has emphasized that an important goal of its intercarrier compensation reform efforts is to "encourage efficient use of, and investment in, telecommunications networks, and the efficient development of competition."[52] Granting Level 3's forbearance petition would seriously undermine this goal and would raise questions about the Commission's commitment to fairly and equitably reforming its intercarrier compensation regime. The Commission should instead promptly deny Level 3's petition and move ahead expeditiously with holistic intercarrier compensation reform.

b. Forbearance Would Lead to Unjust and Unreasonable Rates.

In its petition, Level 3 asserts that paying reciprocal compensation for IP-PSTN calls, rather than access charges, would result in just and reasonable rates for the ILECs who originate or terminate these calls.[53] According to Level 3, because reciprocal compensation rates for local PSTN-PSTN calls are subject to the pricing standards of section 252(d)(2) and, where necessary, oversight by state commissions during arbitration proceedings, these rates are inherently just and reasonable.[54] Level 3 reasons that, since reciprocal compensation rates are inherently just and

[51] As noted, the Commission has already recognized that the *current* limited ESP exemption is a form of regulatory arbitrage that creates an artificial cost advantage by allowing ISPs to avoid access charges on the originating end of an IP telephony call. *See Intercarrier Compensation NPRM* ¶ 12. The Commission would substantially exacerbate this unfair advantage if it granted Level 3's petition.

[52] *Intercarrier Compensation NPRM* ¶ 2.

[53] Level 3 Petition at 45-48.

[54] Level 3 Petition at 45-46.

reasonable in the context of local PSTN-PSTN calls, these rates must also necessarily produce just and reasonable compensation for the access services provided by ILECs who originate or terminate IP-PSTN calls.[55]

Level 3's argument fails as a matter of basic common sense. The fact that a particular rate may be just and reasonable in one context for one service does not mean the rate is automatically just and reasonable in any other context or for any other service to which it could theoretically be applied.

Moreover, Level 3's argument conveniently ignores the fact that the Commission has already determined that price cap ILEC access charge rates are, in fact, just and reasonable. Specifically, as part of its comprehensive efforts to reform access charges and universal service, the Commission established a set of target access charge rates for price cap ILECs in the *CALLS Order*.[56] The Commission found that the target rates were "within the range of estimated economic costs of switched access" on the record before it. [57] Based on this finding, the Commission decided that the public interest would be better served by immediately beginning to reduce access charges toward the target rate levels rather than conducting a lengthy and complex rate case.[58]

Nonetheless, some commenters in the CALLS proceeding -- including Level 3 -- argued that the Commission should instead set the target rates even lower using state approved reciprocal compensation rates.[59] The Commission flatly rejected this argument. The Commission pointed out that, "as a legal matter, transport and termination of local traffic are

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[55] Level 3 Petition at 46.

[56] *CALLS Order* ¶¶ 151-82.

[57] *CALLS Order* ¶ 176.

[58] *CALLS Order* ¶¶ 176, 178.

[59] *CALLS Order* ¶ 178.

different services than access service" and therefore are "regulated differently."[60] The Commission concluded that the target rates it adopted were "a reasonable transitional estimate of rates that might by set through competition,"[61] and held that the target rates were "just and reasonable."[62]

In its current petition, Level 3 neither addresses the Commission's holding in the *CALLS Order* nor explains why it would be just and reasonable to compensate ILECs for access services at rates *below* what the Commission has already found to be "a reasonable temporary estimate of prices that might be set in a competitive market."[63] Indeed, Level 3 tacitly acknowledges that such an approach may not be just and reasonable when it blithely asserts that, to make up any shortfalls from the lower reciprocal compensation rates, an ILEC "simply must turn to its own customer[s]" through increased federal or state end-user charges.[64] But even Level 3 is forced to acknowledge that such end-user rate increases would necessitate state and federal approvals[65] -- which would involve costly, time consuming proceedings with uncertain outcomes. To address this shortcoming in its argument, Level 3 glibly suggests that dissatisfied ILECs file lawsuits against the states or this Commission "to have state or federal rate limits set aside as confiscatory takings."[66]

Aside from being entirely self-serving, Level 3's suggested course of action would have the perverse effect of removing the burden from Level 3 to demonstrate that its forbearance request would not result in unjust and unreasonable rates. Instead, it would place the burden on

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[60] *CALLS Order* ¶ 178.

[61] *CALLS Order* ¶¶ 176, 178.

[62] *CALLS Order* ¶ 176.

[63] *CALLS Order* ¶ 176.

[64] Level 3 Petition at 46.

[65] Level 3 Petition at 47.

[66] Level 3 Petition at 47.

the ILECs to prove a need for rate increases to compensate for the shortfalls created by Level 3's proposed forbearance. This burden shifting turns the first part of the forbearance test in section 10 completely on its head by creating a *presumption* that rates will remain just and reasonable until an injured party demonstrates otherwise. Level 3 has clearly failed to satisfy the first prong of the forbearance test and the Commission must reject Level 3's attempt to rewrite section 10 to suit its own needs.

3. Enforcement of the Commission's Access Charge Rules for IP-PSTN Calls Is Critically Important for the Protection of Consumers.

In section 1 of the Communications Act, Congress charged the Commission with ensuring that "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" is available to "all the people of the United States."[67] Congress further added to this mission in the 1996 Act, where it directed the Commission to preserve and advance universal service through policies that ensure quality service is available to consumers in all regions of the Nation -- including rural, insular and high-cost areas -- at affordable and reasonably comparable rates.[68]

The Commission has long recognized that the ability of ILECs to offer affordable communications service is largely dependent on the regulations applicable to the combination of three sources of revenue: (1) access charges; (2) universal service; and (3) end user rates.[69] As discussed above, whenever the Commission has lowered ILEC access charges in the context of its reform efforts, it has sought to ensure appropriate adjustments in universal service support and/or end user rates to enable ILECs to maintain an affordable level of service for their customers.[70]

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[67] 47 U.S.C. §151.

[68] 47 U.S.C. §254(b)(1), (3).

[69] *See CALLS Order* ¶¶ 5-28 (discussing the history of the Commission's regulations governing intercarrier compensation and universal service).

[70] *See supra* section II.

Although Level 3 acknowledges the important role that access charges have played in keeping consumer rates affordable, Level 3 suggests that interstate access charges no longer contain significant implicit universal service support and therefore exempting IP-PSTN traffic from access charges will not affect the affordability of consumer rates.[71] Level 3's argument is self-defeating. If interstate access charges no longer contain any implicit subsidies, they are *ipso facto* merely compensatory. Hence, lowering these charges without making up the difference through other means would be confiscatory.[72]

More importantly, most states clearly have not removed subsidies from *intrastate* access charges. Indeed, Level 3 itself complains about the slow pace of state commission efforts to remove implicit support from intrastate access rates and the resulting high intrastate access charges it faces in Texas, Colorado and South Dakota.[73] But the fact is that those intrastate access rates support below cost basic local service rates. The Commission cannot let Level 3 simply stop paying those access charges on IP-PSTN traffic merely because Level 3 is unhappy with state reform efforts to date. Doing so in the manner suggested by Level 3 would set a dangerous precedent and seriously jeopardize the affordability and universal availability of local telephone service for countless consumers across the nation.

Even if all implicit support were completely removed from interstate *and* intrastate access charges (an assertion that Level 3 cannot credibly make), those access charges would still represent a critical source of *revenue* through which ILECs recover their *costs* of providing access services.[74] In apparent recognition of this fact, Level 3 tells the Commission that it need not worry about exempting IP-PSTN traffic from access charges because that traffic is not

[71] Level 3 Petition at 49, 51.

[72] While the Commission has removed a substantial amount of implicit universal service support from interstate access charges, it is by no means clear that the Commission has removed *all* such subsidies.

[73] Level 3 Petition at 21-22, 52.

[74] *CALLS Order* ¶ 176 (finding that the target price cap access rates were "within the range of estimated economic costs of switched access").

expected to grow substantially over the next few years.[75] However, the flurry of recent announcements by major U.S. carriers about their plans to deploy VoIP services casts serious doubt on the accuracy of Level 3's muted predictions.[76] In fact, Level 3's own self-described "aggressive push into [the] VoIP market" belies Level 3's claim that it expects VoIP services to grow at only a modest pace.[77] But perhaps the most telling estimation of VoIP's potential for rapid growth comes from AT&T's Chief Technology Officer, who bluntly predicted that "IP will eat everything."[78] Given the substantial industry migration to IP-based voice services that is now well underway, the Commission cannot credibly find that exempting IP-PSTN traffic from access charges would not pose a serious threat to ILECs' ability to maintain affordable rates for consumers across the nation.[79]

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[75] The basis for Level 3's sweeping prediction is a single, largely illegible chart from an April 2003 study by Gartner Group that purports to show that industry revenue from VoIP will constitute 4 percent of circuit-switched domestic and international U.S. long distance revenue by 2006.

[76] *AT&T Unveils Major Voice over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004*, AT&T News Release, Dec. 11, 2003; *Time Warner Cable Partners with MCI and Sprint for Nationwide Rollout of Digital Phone - Multi-Year Agreements to Provide High Value, Carrier Grade IP Voice Service*, MCI News Release, Dec. 8, 2003; *Verizon Selects Nortel Networks to Accelerate Building of Nation's Largest Converged, Packet-Switched Wireline Network Using Voice-Over-IP Technology*, Verizon News Release, Jan. 7, 2004; *Covad Announces Voice Over Internet Protocol (VoIP) Deployment Plans*, Covad News Release, Feb. 9, 2004; *Vonage Becomes First Broadband Telephony Provider to Activate 100,000 Lines*, Vonage News Release, Feb. 2, 2004. Each news release is available on its respective company's website.

[77] *See Level 3 Announces International Voice Service; Continues Aggressive Push into VoIP Market*, Level 3 News Release, Jan. 12, 2004; *Level 3 Launches New Business Voice Service*, Level 3 News Release, Sept. 22, 2003.

[78] Hossein Eslambolchi, AT&T CTO & CIO and President AT&T Labs, *Services over IP Network Evolution* at 10, attached to *Ex Parte* Letter from Pat Merrick, AT&T, to Marlene Dortch, FCC, CC Docket No. 01-92, et al (Nov. 5, 2003).

[79] In addition to seeking forbearance from the application of access charges on IP-PSTN traffic, Level 3 also seeks forbearance from what it describes as "incidental PSTN-PSTN" traffic. Level 3 Petition at 7. Level 3 claims that this traffic would include situations where traffic would normally terminate on a customer's IP PBX but the traffic is "forwarded" to a particular end-user's cellphone. *Id*. Level 3 asserts that "incidental PSTN-PSTN" traffic does *not* include the IP-in-the-middle long distance traffic on which AT&T seeks to avoid access charges. *Id*. at 7 n.20. While Level 3 appears to describe this traffic as "de minimis," Level 3 offers no explanation of why such traffic is truly *de minimis*. Indeed, if the Commission were to exempt such traffic from access charges -- and it should not -- there is every reason to expect that certain carriers would exploit such an exemption by routing standard PSTN-PSTN calls

4. Forbearance from Applying Access Charges to IP-PSTN Calls Is Not in the Public Interest.

In evaluating whether a request for forbearance is in the public interest under section 10(a)(3), the Commission is required to consider whether such forbearance will promote competition.[80] Boiled down to its essence, Level 3's argument is that exempting providers of IP-PSTN calls from paying access charges will "boost competition" by reducing costs for these providers.[81] But reducing costs is not the same thing as promoting competition. In fact, rather than promoting competition, Level 3's request for forbearance will grossly distort competition and tilt the regulatory playing field in Level 3's favor.

Providers of IP-PSTN calls use an ILEC's circuit-switched facilities to complete the PSTN portion of a call in the exact same fashion as providers of traditional long distance calls.[82] Exempting providers of IP-PSTN calls from the access charges applicable to these facilities would affirmatively skew competition in favor of these providers and against traditional long distance providers because providers of IP-PSTN calls would gain a significant cost advantage over their non-IP competitors -- not as a result of superior technology or better service quality -- but purely because of a regulatory decision to exempt them from access charges. In this way, forbearance from access charges would create a massive new subsidy running from the local telephone companies who supply access services and the traditional long distance carriers who pay access charges for those services, to the providers of IP-PSTN calls who would be able obtain those very same services at a substantial discount. Such a result would be in direct conflict with the principle of competitive neutrality, which this Commission has so strongly

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through some minimal amount of IP "forwarding" technology for the sole purpose of avoiding access charges. SBC thus opposes Level's forbearance request regarding "incidental PSTN-PSTN" traffic for all of the reasons stated above concerning IP-PSTN traffic.

[80] 47 U.S.C. § 160(a)(3).

[81] Level 3 Petition at 38.

[82] *See supra* section III.A.

embraced,[83] and would undermine this Commission's desire to promote the "efficient development of competition" through the holistic reform of its intercarrier compensation mechanisms.[84]

Indeed, this is not the first time that the Commission has been confronted with a party seeking an unfair competitive advantage while the Commission was already undertaking a more comprehensive, industry-wide reform effort. In the *Oncor Order*, the Commission addressed a request by Oncor Communications for forbearance from the Commission's universal service contribution rules.[85] Oncor was experiencing declining year-over-year revenue, making it difficult for Oncor to meet its contribution obligations. The Commission observed that its existing contribution methodology was not discriminatory because it required all similarly situated carriers (i.e., providers of interstate telecommunications service) to contribute on the same basis. Nonetheless, the Commission recognized that marketplace changes warranted reforms to its contribution methodology and pointed out that it had initiated a proceeding to overhaul that methodology. The Commission concluded, however, that in the meantime, exempting Oncor from universal service contributions would give Oncor an unfair competitive advantage over other carriers who were still required to contribute.[86]

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[83] *See, e.g.*, *Universal Service Order* ¶ 47; *Oncor Order* ¶ 9. *See also* Jay M. Atkinson & Christopher C. Barnekov, *A Competitively Neutral Approach to Network Interconnection,* Office of Plans and Policy, FCC (Dec. 2000).

[84] *Intercarrier Compensation NPRM* ¶ 2.

[85] *Federal-State Joint Board on Universal Service, Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. D/B/A Oncor Communications, Inc.*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 4382 (2001) (*Oncor Order*).

[86] *Oncor Order* ¶ 16. Although Level 3 is not seeking a total exemption from compensating ILECs for the use of their networks, it most certainly is asking the Commission to give it a substantial cost advantage over its traditional long distance service competitors who use LEC access facilities in exactly the same way Level 3 uses them. It is precisely this type of discriminatory cost advantage that the Commission found to be competitively "unfair" in the *Oncor Order*. *Id*.

The Commission's rationale for denying Oncor's forbearance petition applies with equal force to Level 3. Granting Level 3's petition would provide Level 3 with an unfair competitive advantage by allowing it to obtain a reduced rate for access services, while competitors providing traditional long distance voice services pay the lawfully prescribed rate for the exact same services. For the same reasons of competitive fairness expressed in the *Oncor Order*, the Commission should deny Level 3's present petition.

Level 3 also argues that forbearance is required to reduce regulatory uncertainty over the proper form of intercarrier compensation applicable to IP-PSTN traffic.[87] As discussed above, under the Commission's longstanding access charge rules, access charges apply to IP-PSTN calls. But to the extent that Level 3 or any other carrier is purportedly uncertain about the applicability of access charges, the Commission should eliminate that uncertainty by unequivocally declaring that, unless and until the rules change, access charges apply to this type of traffic. While applying access charges to IP-PSTN traffic may raise some implementation issues, including how this traffic will be jurisdictionalized,[88] it would be wholly inappropriate to simply jettison access charges from this traffic altogether to avoid resolving these issues. Instead, to the extent the Commission believes any *changes* are required in its rules to address these issues, it should consider those changes in a holistic fashion in its *Intercarrier Compensation NPRM*.[89]

[87] Level 3 Petition at 40.

[88] Level 3 Petition at 40.

[89] *See* SBC IP Platform Services Petition for Declaratory Ruling at 53 (" To the extent the Commission deems it necessary to consider any changes in its access charge rules, or the establishment of new rules, those matters should be addressed in the pending intercarrier compensation proceeding. It is only in that context that the unique issues raised by access charges can be addressed holistically and in a manner that does no harm to the Commission's longstanding commitment to the goal of universal service.").

C. Notwithstanding SBC's Opposition to Level 3's Petition for Forbearance from Access Charges, SBC Supports a Minimally Regulated Environment for IP Platform Services.

Although SBC opposes Level 3's petition for forbearance from access charges on IP-PSTN traffic, SBC fully agrees with Level 3 that IP-based services hold tremendous potential to bring exciting new products to consumers and businesses and renewed investment and innovation to all sectors of the communications industry. For these reasons, SBC recently filed petitions asking the Commission to declare that "IP platform services" are interstate information services subject to the Commission's Title I jurisdiction and to forbear, to the extent necessary, from any Title II regulations that might otherwise theoretically be applied to these services.[90] As SBC explained in its petition: "[B]y declaring that IP platform services are not subject to Title II regulation, the Commission would preclude the encroachment of common carrier regulation into the IP sphere, maintain the status quo for IP platform services, and accommodate with regulatory certainty the evolution of IP network technology, services, and applications."[91]

Indeed, SBC believes that the IP-based services described in Level 3's petition would likely qualify as IP platform services and should not be subject to traditional common carrier regulation under Title II.[92] But as explained above and in SBC's petitions, to the extent these services originate or terminate over the PSTN, they are subject to the access charge regime until such time as the Commission modifies its access charge rules. To that end, SBC remains committed to working with the Commission, the communications industry, and other stakeholders to develop and implement a fair and equitable proposal for intercarrier compensation reform.

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[90] *See* SBC IP Platform Services Petition for Declaratory Ruling; SBC IP Platform Services Petition for Forbearance.

[91] SBC IP Platform Services Petition for Declaratory Ruling at iii.

[92] *See* Level 3 Petition at 11-14.

IV. CONCLUSION

For the forgoing reasons, the Commission should deny Level 3's petition for forbearance.

Respectfully Submitted,

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